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In the Supreme Court of the United States

OCTOBER TERM, 1995

PENN ADVERTISING OF BALTIMORE, INC.,
Petitioner,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE CITY, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE OUTDOOR ADVERTISING ASSOCIATION OF AMERICA, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

David H. Flint *
Schreeder, Wheeler & Flint
1600 Candler Building
127 Peachtree Street, N.E.
Atlanta, Georgia 30303-1845
(404) 681-3450

* Counsel of Record

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INTEREST OF THE *AMICUS CURIAE*

This brief is submitted by the Outdoor Advertising Association of America, Inc. (the "OAAA"), the national trade

association of the standardized outdoor advertising industry in the United States. The OAAA's functions include the promotion of outdoor advertising as a medium of public communication.

The OAAA's membership is composed of approximately 200 companies which serve 7,900 distinct local areas throughout the United States. Four OAAA member companies, including Petitioner Penn Advertising of Baltimore, Inc. ("Penn"), maintain operations within the City of Baltimore.

The OAAA and its member companies have a direct interest in this case because it presents fundamental questions regarding the authority of state governmental entities to prohibit the dissemination of constitutionally protected commercial speech on outdoor advertising signs. In addition, the OAAA and its member companies have a direct interest in assuring that the Federal Cigarette Labeling and Advertising Act ("FCLAA") is complied with and that its members will not become subject to the "diverse, nonuniform, and confusing" regulations regarding cigarette advertising that FCLAA was intended to prevent. Thus, the issues in this case transcend those of a mere dispute between a single outdoor advertising company and a single governmental unit, and instead require this Court's interpretations on crucial issues regarding the First Amendment and Federal statutory law. If certiorari is not granted and if the Fourth Circuit's decision is ultimately permitted to stand, OAAA members will immediately be confronted by a welter of conflicting prohibitions and restrictions that will affect their businesses and their ability to communicate messages to the public regarding tobacco and other products.

All parties to this action have consented to OAAA's participation. Consent letters from counsel have been lodged with the Clerk of the Court.

SUMMARY OF ARGUMENT

In 1994 the City of Baltimore enacted Ordinance 307, which prohibits cigarette advertising on billboards in much of the City, in contravention of the First Amendment to the Constitution of the United States and in defiance of the Federal Cigarette Labeling and Advertising Act ("FCLAA"), 15 U.S.C. § 1331, *et seq.* In upholding Baltimore's Ordinance 307, the Fourth Circuit failed to apply this Court's well defined test for evaluating the constitutionality of restrictions on commercial speech and read the preemption provision of FCLAA out of existence in contravention of this Court's directives for interpreting the scope of the preemptive effect of an act of Congress.

The Fourth Circuit's decision that Baltimore had the authority to enact prohibitions on the dissemination of cigarette advertising is based on a patently incorrect construction of FCLAA. The only issue in construing the applicability of FCLAA is a determination of whether Baltimore has enacted a "requirement or prohibition" of cigarette advertising that is "based on smoking and health." The City has conceded that Ordinance 307 is such a law and therefore the court of appeals' characterization of Ordinance 307 as "locational" is erroneous and directly frustrates the purpose of Congress in enacting FCLAA — to assure that commerce and the national economy are not impeded by diverse, nonuniform, and confusing cigarette advertising regulations.

The Fourth Circuit's decision also stands in stark conflict with this Court's admonition that where the government seeks to defend the constitutionality of a restriction on commercial speech it must demonstrate that ". . . the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield v. Fane*, 113 S. Ct. 1792, 1800 (1993). The Fourth

Circuit's virtually complete deference to the findings of the Baltimore City Council, based on their seeming "reasonableness," eviscerates this standard of review and permits the government to restrict commercial speech in the service of other objectives which could not survive a First Amendment challenge. *Ibid.* Moreover, this retrogression from the standard of review mandated by this Court's rulings destroys the ability of the courts to determine whether, as in this case, a superficially "reasonable" restriction of speech may in fact be a pretext for advancing a different legislative agenda.

This case is one in which the facts strongly indicate that Baltimore had the objective of using its purported interest in reducing the smoking of cigarettes by minors to achieve a goal which could not justify a burden on commercial speech. Although Baltimore claims that its goal is to reduce smoking by minors, the ordinance is so underinclusive that the only advertising medium seriously affected by the ordinance is billboards. Not coincidentally, Baltimore has had a largely unsuccessful 40 year battle to eliminate billboards from many areas of the City. The highly deferential review of Ordinance 307 by the district court and the Fourth Circuit effectively prevented the plaintiff billboard company from demonstrating the underinclusiveness of the ordinance and precluded an examination of whether Ordinance 307 serves objectives other than the reduction of smoking by minors.

ARGUMENT

I. THE FOURTH CIRCUIT ERRED BY HOLDING THAT ORDINANCE 307 IS NOT PREEMPTED BY THE FEDERAL CIGARETTE LABELING AND ADVERTISING ACT

Section 5 of the Federal Cigarette Labeling and Advertising Act ("FCLAA") states that:

> No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of cigarettes the packages of which are labeled in conformity with the provisions of this chapter.

15 U.S.C. § 1334(b). This Court has held that the preemptive scope of this provision is governed entirely by its express language. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517 (1992). Despite the wording of Section 5 of FCLAA and the directive of this Court in *Cipollone*, the court of appeals completely ignored the express language of Section 5 in holding that Ordinance 307 was not preempted by FCLAA.

In the instant case there is no dispute that the cigarettes at issue are labeled in conformity with the provisions of FCLAA. There is no dispute that Ordinance 307 prohibits the placement of advertisements for cigarettes on billboards in areas of the City. There is no dispute that the City Council passed Ordinance 307 because of its concerns about the perceived health risks related to

smoking by minors.[1] Yet somehow the court of appeals found that, despite these undisputed facts, Ordinance 307 was not a "requirement or prohibition based on smoking and health . . . with respect to the advertising of cigarettes. . . ." Instead, the court of appeals concluded that "Ordinance 307 limits only the *location* of signs that advertise cigarettes, but it does not address the *content* of such advertisements." Pet. App. 9a.

The court of appeals' decision makes no sense in this

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[1] In its briefs before the district court and the court of appeals, the City had argued that Ordinance 307 was not enacted because of concerns about smoking and health. However, during oral argument before the Fourth Circuit, counsel for the City conceded that the Baltimore City Council had enacted Ordinance 307 out of its "concern with the health of children." *See*, Ct App. Tr. 23. Indeed, in its analysis upholding the constitutionality of Ordinance 307, the Fourth Circuit found that the City's objective of reducing cigarette consumption by minors was a substantial governmental interest when viewed "[i]n the context of the current public concern over the dangers of cigarette consumption by minors. . . ." Pet. App. 10a.

There cannot be a serious argument at this juncture that the Baltimore City Council was not motivated by concerns over smoking and health when it enacted Ordinance 307. The fact that there is evidence that the Baltimore City Council also was motivated by a desire to restrict billboards in Baltimore does not change this analysis. Where a state or local law is motivated by more than one purpose, this Court has held that, so long an one of the purposes is impermissible, the law is preempted by federal law. *Gade v. National Solid Waste Management Ass'n*, 505 U.S. 88 (1992); *Perez v. Campbell*, 402 U.S. 637 (1971).

regard and stands in direct conflict with Supreme Court precedent. The simple fact is that Ordinance 307 prohibits currently existing billboards in certain areas of the City of Baltimore from continuing to carry a certain category of advertising. That prohibited category of advertising is defined solely in terms of the content of the advertising. Ordinance 307 is simply a partial prohibition of cigarette advertising.

This Court has specifically rejected the Fourth Circuit's reasoning as recently as 1993 in its decision in *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505 (1993). In *Discovery Network*, the City banned newsracks containing "commercial handbills," while permitting newsracks containing "newspapers." The City of Cincinnati argued that the law was content-neutral and should be judged under the "time, place, manner" test. This Court rejected the Cincinnati's argument, stating:

> Under the city's newsrack policy, whether any particular newsrack falls within the ban is determined by the content of the publication resting inside the rack. Thus, by any commonsense understanding of the term, the ban is "content-based."

Discovery Network, 113 S. Ct. at 1515-16.

In the instant case, whether any particular advertisement falls within the ban of Ordinance 307 is determined not only by the *location* of the billboard but also by the *content* of the advertising displayed on the billboard. Thus, as in *Discovery Network*, "by any commonsense understanding of the term" the ban of Ordinance 307 addresses the content of the advertising on billboards. There is simply no way to square this Court's analysis in *Discovery Network* with the Fourth Circuit's analysis in the

instant case.

Taken to its logical conclusion, under the Fourth Circuit's analysis, as long as the City of Baltimore did not attempt to ban *all* cigarette advertising in all advertising media in the City, any lesser ban of cigarette advertising would be a limitation on "location" and not on "content." The vacuousness of the Fourth Circuit's logic is painfully apparent.

When Congress enacted FCLAA, it required health warnings on cigarette packages (and later cigarette advertising). Congress also enacted the preemption provision of FCLAA, 15 U.S.C. § 1334(b), in order to assure that "commerce and the national economy" were "not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health." 15 U.S.C. § 1331.

The action of the City of Baltimore in enacting Ordinance 307 stands in direct conflict with the express will of Congress as set forth in FCLAA. The action of the Fourth Circuit in holding that Ordinance 307 is not preempted by FCLAA is nothing less that a judicial rewriting of an act of Congress which totally changes the purpose and effect of Section 5 of FCLAA.

The Baltimore City Council does not have the power to ignore FCLAA – an act of Congress – because it does not like it. The Fourth Circuit erred when it countenanced Baltimore's conduct in defying the express wording of FCLAA by holding that Ordinance 307 was not preempted because it did not address the "content" of cigarette advertising.

The Fourth Circuit's decision results in precisely the circumstance Congress explicitly sought to avert when it enacted

Section 5 of FCLAA: "diverse, nonuniform and confusing" cigarette advertising regulations with respect to a relationship between smoking and health. Cigarette advertisers now have one set of advertising regulations in Baltimore and another set in the rest of the country. And, given the degree of interest in the issue of cigarette advertising, it is virtually certain that other members of the OAAA will soon be confronted with other localities following Baltimore's lead and enacting their own peculiar laws banning cigarette advertising on billboards in some, or all but one or two locations, or even all locations within their jurisdiction.

It has been well settled law since 1819 that, under Article VI of the Constitution, a state law which conflicts with a federal law is of no effect. *McCulloch v. Maryland*, 4 Wheat. 316, 472 (1819). This Court has also held that the purpose of Congress in passing a federal act is the ultimate touchstone of preemption analysis. *Cipollone*, 505 U.S. at 516. While an express preemption provision like FCLAA should be fairly and narrowly interpreted, *Cipollone*, 505 U.S. at 523, a narrow interpretation is not the same thing as a construction which is so unreasonably cramped that it reads FCLAA out of existence. *National Broiler Council v. Voss*, 44 F.3d 740, 743 n.1 (9th Cir. 1995). The Fourth Circuit's action is particularly egregious because FCLAA is often cited by the lower courts as the archetype of "broad pre-emption clauses." *Ibid.* 44 F.3d at 745; *Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc.*, 981 F.2d 1177, 1179 (10th Cir. 1993); *Stamp v. Collagen Corp.*, 984 F.2d 1416, 1421 (5th Cir. 1993).

This Court should grant the petition for certiorari so that it may consider whether the court of appeals' decision upholding Ordinance 307 is inconsistent with the express will of Congress as set forth in Section 5 of the Federal Cigarette Labeling and Advertising Act and contrary to the decisions of this Court

interpreting Article VI of the Constitution. To do otherwise would be to invite the "diverse, nonuniform and confusing" regulation of cigarette advertising that Congress intended to prevent when it enacted FCLAA.

II. THE FOURTH CIRCUIT'S DECISION, IF ALLOWED TO STAND, WILL PERMIT GOVERNMENTAL ENTITLES TO USE COMMERCIAL SPEECH RESTRICTIONS AS A PRETEXT TO ACHIEVE UNDISCLOSED GOALS

The Petition for Certiorari brings to this Court's attention a case of major significance because the decision of the court of appeals, if permitted to stand, will completely compromise judicial review of governmental restrictions on protected commercial speech. If the Fourth Circuit's decision is left unattended, analysis of commercial speech prohibitions inevitably will shift in many lower courts from the fact-driven standard for review established by this Court in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980), to a lower level of scrutiny based solely on the superficial ". . . reasonableness of the legislature's purpose. . . ." Indeed, this Petition is particularly compelling because the manner in which this case was disposed of crystallizes this Court's deepest concerns that a regulation of commercial speech may easily be used as a pretext for achieving some unrelated and undisclosed purpose if the government is not held to its burden of demonstrating that ". . . the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield v. Fane*, 113 S. Ct. 1792, 1800 (1993). This Court has emphasized, and reemphasized its fears that:

> [w]ithout this requirement, a state could with ease

> restrict commercial speech in the service of other objectives that could not themselves justify a burden on commercial speech.

Ibid. *See* also, *Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585, 1592 (1995).

There is much to suggest that this is precisely what occurred in Baltimore in 1993 when the City Council determined that billboards were the only medium where the dissemination of cigarette and alcoholic beverage advertising[2] that should be prohibited. There are clear indicia that these measures, postured as restrictions on speech to protect minors, were pretextually enacted as an artifice to destroy the economic base for certain billboards that the City has unsuccessful sought to eliminate for more than forty years. But because of the lower courts' failure to apply the *Edenfield* standards and the resulting rush to judgment without independent judicial scrutiny of Ordinance 307 and the companion restrictions on alcoholic beverages at issue in *Anheuser-Busch v. Schmoke*, 63 F.3d 1305, 1314 (4th Cir. 1995), Penn was effectively checked from ever even bringing these matters to the fore in this litigation

The burden of a governmental restriction on commercial speech often falls on the medium that disseminates the restricted message, as well as upon the advertiser itself. But in this case, the motivations underlying Baltimore's restrictions on publicly visible cigarette advertising become inherently suspect because

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[2] The Baltimore Ordinance affecting alcoholic beverage advertising on billboards is the subject of a separate petition for certiorari. *See*, *Anheuser-Busch v. Schmoke*, No. 95-685.

the weight of these restrictions falls disproportionately — if not exclusively — on the outdoor advertising medium.

This case is haunted by the fact that, despite the City Council's professed concern regarding the dissemination of cigarette advertising in publicly visible locations, the regulation actually adopted exempts virtually every publicly visible medium except for billboards. For example, although cigarettes are sold in literally thousands of retail locations throughout the City, the City Council nonetheless elected to exempt the dissemination of advertisements on signs located on the exterior of these establishments. Despite the City Council's professed concern regarding the effect of such advertising on minors, it inexplicably exempted all of the advertising signs located in such obviously child-oriented venues as the City's landmark Oriole Park at Camden Yards, as well as the signs that blanket the public transit buses that circulate freely within the City — including those buses that daily transport thousands of Baltimore children to school.

Outdoor advertising is the only publicly visible medium within Baltimore that is affected in any substantial manner by the prohibitions in Ordinance 307. In fact, billboards are the only medium disseminating cigarette advertising in the City that sustains any significant economic impact from the regulation. Indeed, one of the few uncontroverted facts in the record reveals that even cigarette advertisers themselves are not as severely impacted as Penn, since the advertisers can readily switch to other exempt publicly visible media or to the other media such as newspapers, magazines and in-store advertising that are left completely untouched by Ordinance 307. *See, e.g.*, Ct. App. J.A. 1121-1147. But Ordinance 307's seemingly inexplicable exemptions, and the completely disproportionate economic burden that these commercial speech restrictions place on outdoor

advertising alone, are simply the most overt indicia that Baltimore's ostensible effort to curtail cigarette advertising on billboards may mask other more subtle legislative objectives.

The true motivation behind the Baltimore City Council's effort to preclude Penn from disseminating cigarette and alcoholic beverage advertising — two of the largest categories of advertising in the United States — comes into sharper focus when Ordinance 307 is considered within the broader context of the City's contentious record of attempted billboard regulation. As discussed above, the Fourth Circuit's dismissal of this regulation as "locational" in character makes no sense in the context of an analysis of FCLAA. However, the lower court's perception is particularly revealing in considering whether the commercial speech restrictions are a convenient pretext for exerting economic pressure on Penn to remove the billboards at these proscribed locations.

The simple fact is that Baltimore has had a forty year record of unsuccessful efforts to force Penn and its predecessors to eliminate billboards from the City. Beginning in 1950, the City has enacted a succession of ordinances that categorized Penn's billboards located in commercial/residential zones as nonconforming uses and ordered their removal after the expiration of a short so-called "amortization" period. Ultimately in 1957, the Maryland Court of Appeals sustained this use of City's police power. *Grant v. Mayor and City Council of Baltimore*, 212 Md. 301 (1957). But Baltimore's actions in this regard were effectively blocked in 1983 when the State of Maryland amended the Maryland Code to require municipalities to pay fair market value for any lawfully erected outdoor advertising sign that they require to be removed. Md. Code Ann.

art. 25, § 122E (1994).[3] Around the same time, the focus of the City's billboard removal efforts shifted from enforcement of zoning controls to the enactment of content-based regulations aimed at eliminating billboards from certain districts in the City. The first such effort is documented in a 1982 district court decision in *Metromedia v. Baltimore*, 538 F. Supp. 1183 (D. Md. 1982). There, the district court applied this Court's decision in *Metromedia v. San Diego*, 453 U.S. 490 (1981) to strike down a Baltimore ordinance that would have forced the elimination of billboards in certain sections of the City while imposing narrow content-based restrictions on the on-premise signs that were permitted to remain.

In 1990, the City again became embroiled in billboard litigation that is particularly revealing in terms of the City Council's professed desire to curtail cigarette and alcohol advertising because it resulted from a specific determination by the City to forgo an immediate reduction of such advertising and instead to press for the removal of billboards. *See*, *Chesapeake Outdoor Enterprises, Inc. v. Mayor of Baltimore*, 89 Md. App. 54 (1991). In 1989, Kurt Schmoke, the Mayor of Baltimore, entered into an agreement with a Baltimore billboard company other than Penn in which the parties resolved a longstanding dispute by providing for the immediate removal of 100 billboards and for a four-year phased reduction of tobacco and alcohol beverage advertising to 40% and 35% respectively of the remainder of that

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[3] The relevant terms of Section 122E are substantially similar to those contained in Maryland Senate Bill 702, which was approved by the Maryland legislature in 1982 but was subsequently vetoed by Governor Harry Hughes. *See, Chesapeake Outdoor Enterprises, Inc. v. Mayor of Baltimore*, 89 Md. App. 54, 66 (1991).

company's signs. The agreement had already become operative when the City reneged and refused to comply with the agreement because it would have blocked the City from forcing the removal of more of Chesapeake's signs under the zoning laws. The billboard company sued to enforce the agreement but the Maryland Court of Special Appeals held that the City was within its authority to repudiate the agreement. *Ibid.*

Is it simply a coincidence that the billboards that Penn is prohibited from using for the dissemination of tobacco and alcoholic beverage advertisements are the very same signs that the City has been attempting to remove without compensation for forty years? The original "amortization" law enacted in 1950 made all billboards located in specific commercial zones nonconforming uses and attempted to force their removal without compensation. But a Maryland statute now requires the payment of compensation for such forced removal. Baltimore's companion restrictions on cigarette and alcohol beverage advertising target the same lawfully erected nonconforming billboards, while exempting other signs scattered within isolated commercial and industrial zones.

Complex factual questions like these will never reach the surface in litigation if the Fourth Circuit is correct and judicial review of commercial speech restriction is confined to a superficial review of the ". . . reasonableness of the legislature's purpose. . . . ," Pet. App. 11a, *quoting, Anheuser-Busch, Inc. v. Schmoke*, 63 F.3d 1305, 1314 (4th Cir. 1995). The issue of whether a restriction on protected speech is pretextual involves the most subtle factual inquiry and judicial sensitivity. This is particularly true where, as in this case, the questionable prohibition targets both controversial speech and a controversial medium. In a true sense, the fate of the First Amendment issues in this case was sealed when, only thirty days after Penn filed its

complaint in this case, the district court denied Penn's Expedited Motion for an Extension of Time To Take Discovery. *See,* Ct. App. J.A. 933. At that juncture, this became a runaway case in which the district court, perhaps inadvertently, effectively shielded itself from the facts. If the Fourth Circuit is correct that a legislature is able through careful drafting to wrap itself in an impenetrable barrier of seeming reasonableness, in a short time there will be little left to the *Central Hudson* doctrine.

CONCLUSION

Baltimore has passed a content-based prohibition of cigarette advertising based on smoking and health in direct contravention of the Federal Cigarette Labeling and Advertising Act. The Fourth Circuit's decision that the ordinance is not preempted has resulted in the approval of a law which undermines the express purpose of FCLAA to prevent "diverse, nonuniform and confusing" regulation of cigarette advertising and invites other communities to also defy and frustrate the express will of Congress set forth in FCLAA.

The Fourth Circuit's extremely deferential review of Baltimore's ordinance also conflicts with this Court's explicit rules regarding the burden of proof through judicial review that must be applied against any restriction on commercial speech. If allowed to stand, the Fourth Circuit's decision will encourage other courts to ignore this Court's clear direction that the government must demonstrate that its restrictions on commercial

speech in fact meet the test for such restrictions and will invite other localities to restrict commercial speech in the service of other objectives that could not themselves justify a burden on commercial speech.

Respectfully submitted,

David H. Flint
Counsel of Record
Schreeder, Wheeler & Flint
1600 Candler Building
127 Peachtree Street, N.E.
Atlanta, Georgia 30303-1845
(404) 681-3450

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